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In the Supreme Court of the United States

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OCTOBER TERM, 1970

No. 5795

70-5015

JON RICHARD ARGERSINGER,

Petitioner,

vs.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General of the State of Utah respectfully moves the Court for permission to file this brief as Amicus Curiae.

LAUREN BEASLEY
Chief Assistant Attorney General
State of Utah

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 5798

JON RICHARD ARGERSINGER,

Petitioner,

vs.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General of the State of Utah respectfully moves the Court for permission to file this brief as Amicus Curiae.

INTEREST OF AMICUS

Utah Code Ann. § 77-64-2 (Supp. 1969) provides "that assigned counsel shall represent every indigent person who is under arrest for a crime in which the penalty to be im-

posed could be confinement for more than six months in either jail or prison." The Legislature of the State of Utah, while recognizing that an accused has the right to counsel, has stated that the State is under no duty to provide counsel for an indigent charged with a misdemeanor. Recently, in *Hortencio* v. *Fillis*, 25 Utah 2d 73, 475 P. 2d 1011 (1970) the Supreme Court concluded that it should be left to the legislature if it so desires to expand the system of assigned counsel and to provide for the expenditure of public funds.

The State of Utah agrees with and fully endorses the position taken by the Attorney General of the State of Florida in their stand against the requirement of counsel where an indigent defendant, upon conviction, faces a maximum penalty which does not exceed six months imprisonment and a one thousand dollar fine. Furthermore, there are compelling interest of the State of Utah involved in the ultimate outcome of this case. An adverse ruling in this case would cause an unbearable burden upon the State of Utah in the form of financial shortages, lack of available personnel and inefficient court administration.

QUESTION PRESENTED

Should the right of counsel be extended to require publicly funded counsel for an indigent defendant who upon conviction of a crime faces a maximum penalty which does not exceed six months imprisonment and a one thousand dollar fine.

SUMMARY OF ARGUMENT

The State of Florida does not provide counsel for indigents charged with an offense which entails a possible incarceration of more than six months in jail. This practice is in accord with the Constitution of the United States as interpreted by this Court. In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) the Court held that counsel must be appointed for indigents charged with a felony. Later, *In Re Gault*, 387 U. S. 1, 29 (1967) and *Mempa* v. *Rhay*, 389 U. S. 12, 34 (1967) the Court held that there was an absolute right to appointment of counsel in felony cases. This Court should adhere to the felony-misdemeanor standard to render respect for State legislative judgments concerning the seriousness and consequences attached to various crimes. The "Due Process Clause" of the Fourteenth Amendment should not be used as a tool to enforce a federally dictated code of criminal procedure upon the states.

In the alternative, the "six month" limitation for the appointment of counsel for indigents as practiced by the State of Florida should be adhered to. The right to "trial by jury" is analogous to the right to the asistance of counsel. In *Baldwin* v. *New York*, 399 U. S. 66 (1970) this Court drew the line between petty offenses and serious crimes holding that a "possible six month penalty is short enough to permit classification of the offense 'as petty'." *Id.* at 69. This "six month standard" is also followed in Criminal Justice Act of 1964 and the Federal Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, which rules were promulgated by this Court.

To decide, as petitioner contends, that the appointment of counsel should be extended to any time a deprivation of liberty is possible, would cause an unbearable burden upon the majority of the states. The monetary costs of appointed counsel in addition to the manpower requirements are staggering. Consideration must also be given to the taxed court systems. Counsel for "misdemeanants" would also become a vast spawning ground for writs of habeas corpus. This Court must consider the indirect expense of allocating such a massive amount of its legal and judicial resources to this singular area of concern.

Finally, the Equal Protection Clause does not require appointment of counsel for indigent defendants facing a maximum punishment of less than six months. In the vast majority of "misdemeanors" which entail a possible jail sentence, people who can afford counsel usually do not do so. The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means. Equal protection of the law cannot be advanced by promising more than it can deliver. No matter how much the State elects to furnish, persons with money can buy more.

ARGUMENT

I.

THE PRACTICE OF THE STATE OF FLORIDA WHICH PROVIDES COUNSEL FOR INDIGENTS FACED WITH A POSSIBLE INCARCERATION OF MORE THAN SIX MONTHS

IS IN HARMONY WITH THE SIXTH AMENDMENT AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Neither the Constitution Nor the Decisions of this Court Require Counsel for an Indigent Defendant Charged With a Misdemeanor.

The Sixth Amendment to the Constitution of the United States provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense." "This provision in the Sixth Amendment to the Constitution emerged in an atmosphere of silence concerning the intentions which produced it." Beaney, *Right to Counsel* 25, (1955). There was a general understanding that the federal courts would have jurisdiction of an insignificant number of criminal proceedings and, therefore, "The logical assumption is that no great thought was given to the precise nature of the federal right to counsel." *Id.* at 25.

It is clear, however, that lawyers at common law were not permitted full participation in criminal cases. Not until 1836 did England afford full recognition to the defense lawyer's role in felony prosecutions. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 *DePaul L. Review* 213, 224 (1959). The right to counsel which the Sixth Amendment provides, meant to insure that when a defendant had secured a lawyer to represent him, the

latter would be permitted to participate in the proceedings and speak in the defendant's behalf.

Beginning with *Powell* v. *Alabama*, 287 U. S. 45 (1932) this Court held that the assistance of a lawyer was necessary for a fair trial in cases involving possible capital punishment. Ten years later in *Betts* v. *Brady*, 316 U. S. 455 (1942) the Court held that the Sixth Amendment right of counsel was applicable *only* to the Federal Government. However, the "Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right . . . we cannot say that the Amendment embodies an inexorable command that no trial for any offense or in any court, can fairly be conducted and justice accorded a defendant who is not represented by counsel." *Id.* at 473.

Of course, in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) this court held that the Sixth Amendment was applicable to the states through the Fourteenth Amendment, thus overruling the "special circumstances" rule of *Betts*. In *Gideon* the petitioner was charged in a Florida state court with a felony. Justice Black in writing the opinion of the court stated:

> "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." *Id.* at 344.

Justice Harlan, concurring in *Gideon*, noted:

> "The special circumstances rules has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of *substantial prison sentence.* (Whether the rule should extend to *all* criminal cases need not now be decided.) *Id.* at 351. (Emphasis added.)

Justice Marshall in speaking for a unanimous court in *Mempa* v. *Rhay*, 389 U. S. 12 (1967) said:

> "In *Gideon* v. *Wainwright* . . . however, Betts was overruled and this court held that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment was applicable to the States, and accordingly, that there was an *absolute right to appointment of counsel in felony cases. Id.* at 34. (Emphasis added.)

Also this Court in *In Re Gault*, 387 U. S. 1 (1967) stated that Gault would be entitled to have the state provide counsel "at least if a felony were involved." *Id.* at 29; and if his parents were unable to afford counsel. It is clear that on the basis of past precedents this court has declared that the right to counsel in state courts extends only to felonies. This reasoning is soundly based. The Fourteenth Amendment provides that ". . . Nor shall any state deprive any person of life, liberty, or property without due process of law . . ." In *Gideon*, Justice Black, speaking for the Court, stated, "We accept *Betts* v. *Brady's* assumption, based as it was on our prior cases, that a provision of the

Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the States by the Fourteenth Amendment." *Id.* at 342. Certainly, the duty of the State to provide counsel for indigents charged with a misdemeanor cannot in any sense of the word be termed a "fundamental" right.

As stated in *Brison* v. *State of Florida,* 273 F. Supp. 840 (1967) the right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right, nor are any of the rights guaranteed by the Constitution. Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. *Reynolds* v. *United States,* 98 U. S. 145 (1878). The absolute right to free speech has been qualified and curtailed by libel and slander laws. Such right on occasion must be subordinated to other values and consideration. *Dennis* v. *United States,* 341 U. S. 494 (1950). Likewise, the "absolute right" to counsel in all criminal prosecutions must be qualified by practical exigencies and unless this is done:

> "(t)he necessities of sound judicial administration would be disregarded and the administration of justice thrown into senseless chaos." *Brinson* v. *State of Florida,* 273 F. Supp. 840, 847 (1967).

Indeed, the petitioner does not contend that the Fourteenth Amendment must be applied absolutely, but argues that persons charged with offenses which may result in a loss of "liberty" are to have counsel appointed if they are

indigent. (Petitioner's brief for Certiorari at 41-2). Yet, the Fourteenth Amendment also declares that a State shall not deprive any person of "property" without due process of law. Therefore, in accord with the petitioner's "absolute" construction, the states should afford counsel for indigents charged with a $2 parking violation. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685, 712 (1968).

The traditional state classification of crimes as felonies or misdemeanors should be continued, as the line where appointment of counsel is required. There are extreme circumstances where the felony-misdemeanor distinction might undermine *Gideon*. However, cases such as *Patterson* v. *State*, 227 Md. 194, 175 A. 2d 746 (1961) are the rare exception. In *Patterson*, the defendant was convicted of misdemeanors having a maximum penalty of 2 years or $1000 fine. The lower court refused to appoint counsel because the charges were not "serious" within the statutory definition. The State Supreme Court affirmed. On certiorari, *Patterson* v. *Warden Maryland Penitentiary*, 372 U. S. 776 (1963), the judgment was vacated and the case remanded for further consideration in the light of *Gideon*. It is obvious that a 2 year jail sentence based upon several misdemeanors would violate *Gideon;* however, the vast majority of crimes classified as misdemeanors would not entail such a severe penalty.

One of the basic reasons this Court should adhere to the felony-misdemeanor standard set forth in *Gideon* is respect

for State legislative considerations of the relative seriousness of various crimes. As every school boy knows, the framers of the Constitution established a federal government with limited powers. As the Tenth Amendment declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Indeed, the Bill of Rights was intended to be a limitation upon the federal government and not upon the states. To what extent the Fourteenth Amendment through the "due process clause" incorporates the Bill of Rights guarantees is a subject of considerable controversy. However, apart from the theory, the immediate thrust of the "due process clause" has had profound consequences on state criminal procedure. As stated in *City of Toledo* v. *Frazier*, 10 Ohio App. 2d 51, 226 N. E. 2d 777 (1967).

> "Today a pervasive system instituted by the Supreme Court of the United States covers almost every aspect of state criminal law enforcement from arrest through trial and sentence to appeal. All these limitations have been developed by the United States Supreme Court, case by case, from the vague words of the Fourteenth Amendment's due process of law and equal protection of the laws." *Id.* at 782.

The Supreme Court of the State of Utah in *Dyett* v. *Turner*, 20 Utah 2d 403, 439 P. 2d 266 (1968) has raised a "hue and cry" over this Court's interpretation of the "due process" clause as applicable to criminal procedure:

> "As a result of the recent holdings of that Court, the sovereignty of the States is practically abolished

> and the erstwhile free and independent states are now in effect and purpose merely closely supervised units of the federal government . . ." *Id.* at 267.

The implications of petitioner's argument to provide counsel for whenever a loss of liberty is threatened is in direct contradiction of the concept of federalism as envisioned by the framers of the Constitution. Petitioner contends that crimes should be reclassified so that the actual threat of punishment should actually reflect community standards about the seriousness of the offenses. (Petitioner's brief at 39.) Traditionally, the process of defining crimes and selecting appropriate sentences has been vested with the legislative branch of government. *Morgan* v. *Devine*, 237 U. S. 632, 639 (1915). Therefore, it is solely the prerogative of State legislatures to define crimes and establish attendant penalties for violation.

The State's classification of felony or misdemeanor reflects the decision of State legislatures as to the relevant consequences or seriousness of a particular crime. There is no constitutional requirement that the criminal laws of the various states must be in unison or harmony, nor is the due process clause the appropriate device to impose a national standard of criminal law or procedure. See *Hearings on H. Res.* 17, 91st Cong. 1st Sess. 629-33 (1969), Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 *Calif. L. Rev.*, 929 (1965).

Misdemeanors are usually associated with trivial offenses described as *malum prohibitum* rather than *malum*

in se as are most felonies. Misdemeanors have none of the sanctions in addition to fine or imprisonment associated with felonies. "A conviction of a felony is punished not only by imprisonment but also by the forfeiture of civil rights such as the right to vote, to serve on a jury, and to hold public office. And not infrequently, such a conviction will prove to be an insurmountable barrier to desirable employment." *Wall* v. *Purdy*, 321 F. Supp. 367, 371 (1971).

It may well be that "*Mapp* sounded no death knell for our federalism . . . that a healty federalism depends upon the avoidance of needless conflict between state and federal courts . . . by recognition of their now mutual obligation to respect the *same fundamental criteria* in their approaches." *Ker* v. *California*, 374 U. S. 23, 31 (1963). If petitioner's contentions were to prevail, what was once termed a mutual obligation to respect, will become another militant commandment to obey federally dictated criminal law and procedure.

As stated by the Supreme Court of the State of Washington in *Hendrix* v. *City of Seattle*, 76 Wash. 142, 456 P. 2d 696 (1969).

> "*The traditional line drawn between felonies and lesser crimes has persisted from our colonial beginnings* to the present time and no authoritative decisions to the contrary have been presented to us which eradicate that distinction." *Id.* at 700. (Emphasis added.)

The right to have counsel is not the exact constitutional equivalent of the right to free counsel. The rule should re-

main that counsel for indigents should be supplied at the public expense only for felonies as defined by state law.

One of this Court's greatest members declared, "Delusive exactness is a source of fallacy throughout the law." Holmes' dissent in *Truax* v. *Corrigan*, 257 U. S. 312, 342 (1921). The Sixth Amendment only provides that an accused shall have the *right* to the "Assistance of Counsel." To hold that this provision was "absolute," applicable to every violation of a crime which could result in a loss of liberty, would undermine State legislated criminal law and procedure.

B. The Right to Trial by Jury, the Criminal Justice Act of 1964, and the Rules of Procedure for Trial of Minor Offenses before United States Magistrates, all Use Six Months as a Basis to Distinguish Petty Offenses From Serious Crimes.

1. *Right to Trial by Jury*

The phrase "all criminal prosecutions" applies not only to the right of counsel but also to the right to a jury trial. In *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), this Court held that trial by jury in criminal cases is ". . . (f)undamental to the American scheme of justice" and that the "Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." This Court concluded that a jury trial is guaranteed in all "serious offenses" but does not extend to "petty crimes." The Court did hold on the facts before it where

a crime punished by two years in prison is a serious crime and not a petty offense.

However, in *Baldwin* v. *New York*, 399 U. S. 66 (1970), the Court "drew the line" between petty offenses and serious crimes so that a "possible six-month penalty is short enough to permit classification of the offense as 'petty.'" *Id.* at 69. The significance of *Baldwin* is that the Court looked to various guides to determine whether the length of the authorized prison term or the seriousness of other punishment is enough to require a jury trial. The first guide was "the existing laws and practices in the Nation." *Id.* at 70. This Court noted that in the federal system petty offenses have been defined as those punishable by no more than six months in prison and a $500 fine. 18 U. S. C. Sec. 1 (1964). The Court also looked to State law and determined that in every jurisdiction but New York crimes triable without a jury were also generally punishable by no more than a six month jail term.

Both the right to trial by jury and the right to counsel of the Sixth Amendment are phrased in absolute language. Logically, the phrase "all criminal prosecutions" should be accorded the same meaning as applied to both protections. *Beck* v. *Winters*, 407 F. 2d 125, 128 (8th Cir. 1969). The statement in *State* v. *Borst*, 154 N. W. 2d 888 (Minn. 1967) that, "It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law car adequately defend himself without the assistance of counsel."

Id. at 894; is a gross exaggeration. From the beginning of our colonial history the people of this country have seen a need within the framework of their government for courts of limited jurisdiction designed to handle the lesser offenses speedily. "At the time of adoption of our federal constitution there existed in the country justice of the peace courts . . ." *Hendrix* v. *City of Seattle*, 76 Wash. 142, 456 P. 2d 696, 703 (1969).

In many parts of the country, including Utah, justices of the peace are not even lawyers. What is "inconceivable" is the fact that a defendant would not be able to adequately defend himself in the relatively non-complex proceeding in a justice court. Aside from proceeding in justice of the peace courts, the legal issues involved in the usual misdemeanor are less complex than those involved in a serious offense or felony. The skills necessary to defend a speeding violation are less involved than those required to defend a charge of first-degree murder.

In *Duncan*, supra, Justice White stated that "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. *Id.* at 156. Similarly, the right to counsel protects against arbitrary action and conduct of judge and prosecutor. Moreover, as stated in Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685, 707 (1958), what the right to counsel and the right to trial by jury have in common that largely dis-

tinguishes them from other Sixth Amendment rights, is that both require large out-of-pocket expenditures of public funds.

The second guide in *Baldwin* concerned the fact that every State (with the exception of New York) provided a jury trial for a crime punishable by imprisonment for longer than six months. The reverse is true in the case of the right to counsel, for only a handful of states provide counsel for any crime which would result in imprisonment. Therefore, crimes punishable by a penalty of six months or less should not require the appointment of counsel.

2. *Criminal Justice Act of* 1964

Title 18 U. S. C. Sec. 1 (1964) (1) provides that any offense punishable by death or imprisonment for a term exceeding a year is a felony, (2) any other offense is a misdemeanor, (3) any misdemeanor, the penalty of which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both, is a petty offense. Title 18 U. S. C. Sec. 3006 (b) provides for the appointment of counsel, "In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense defined in section 1 of this title) . . ."

These crimes were defined solely in terms of the severity of the penalty and as is clearly seen, the federal standard provides for the appointment of counsel in federal prosecutions of indigent defendants in all cases other than those in which "petty offenses" are involved. The congres-

sional enactment was preceded by study and research and reflects the legislative recognition of the necessity of representation of indigent defendants within the limits of practicality.

3. *Rules of Procedure for the Trial of Minor Offenses before United States Magistrates*

These rules as promulgated by this Court govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States Magistrates under Title 18 U. S. C. Sec. 3401, and for appeals in such cases to judges of district courts. Rule 2 provides that the magistrate shall inform a defendant charged with a minor offense *other than a petty offense* "of his right to retain counsel" and of "his right to request the assignment of counsel." But for petty offenses under Rule 3, the Magistrate shall state to the defendant the charge against him *and shall inform the defendant of his right to counsel* and to a trial in the district court. Thus, as Justice Black states in dissent, the rules appear to safeguard the rights of trial by jury and assignment of counsel for minor offenses *but not for petty offenses.*" Of course, 18 U. S. C. Sec. 1 (1964) defines a petty offense as any misdemeanor, the penalty of which does exceed imprisonment for a period of six months or a fine of $500. This Court, as well as Congress, has held that an offense with a maximum penalty of six months is a "petty offense which counsel need not be appointed." Although this Court should affirm the felony-misdemeanor distinction except in unusual cases where the penalties for

the misdemeanors are compounded together, in the alternative, the six month standard should be utilized for the necessity of appointment of counsel.

II.

TO EXTEND *GIDEON* TO CRIMES WITH A MAXIMUM SENTENCE OF SIX MONTHS OR LESS WOULD CAST AN OVERWHELMING BURDEN UPON THE STATES.

An extension of appointed counsel to an indigent defendant who upon conviction faces a maximum penalty which does not exceed six month imprisonment would cause an unbearable burden upon the States as well as the Federal Government. In the President's Commission on Law Enforcement and Administration of Justice, Task Report: The Courts, 55 (1967) states that approximately 60 percent of all felony defendants and between one quarter and one half of all misdemeanor defendants are unable to contribute anything to the cost of their defense, and "it is reasonable to assume that at least 50 percent of the defendants in appeals and postconviction proceedings need appointed counsel." *Id.* at 56. Data collected in 1966 by the American Bar Foundation indicates that governmental contributions for defense of the poor in State Courts, *primarily for felony cases alone* are approximately $17 million a year, with private contributions from local communities or charitable foundations providing an additional $1 million. In the Federal System, Congress has appropriated $3 million per year to provide compensation for counsel representing about

15,000 to 20,000 defendants including some charged with misdemeanors at trial or on appeal.

In L. Silverstein, *Defenses of the Poor in the Criminal Cases in American State Courts*, 123 (1965) estimates that there are 5 million *non*-traffic misdemeanor cases brought annually in the United States. The President's Commission, Task Force Report: The Courts, similarly state: "It seems reasonable to assume, therefore, that there are between 4 and 5 million adult misdemeanor court cases each year, exclusive of traffic offenses." *Id.* at 55. In Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 *Ia. L. Rev.* 1249, 1260 (1970) estimates, although no authoritative statistics are available, that there are another 50 *million* traffic offenders per year. If "it is necessary to provide representation for 1 million to 1.25 million indigent misdemeanants annually, compensating assigned counsel . . . would necessitate a total expenditure of between $50 million and $62.5 million annually." *Id.* at 1263. "If a public defender system were utilized, the defense of these same misdemeanants would cost $31.5 million to $46 million. To provide appointed counsel to the 12.5 million indigent traffic offenders at $25 per case would require an annual outlay of $312.5 million. To compensate the 10,417 public defenders necessary for the presentation of indigent traffic offenders . . . would cost 208,340,000 dollars." *Id.* at 1263-1264. While the article considers office expenditures as part of the total, additional expenses should also be considered such as increased court expenditures brought about by additional; facilities, judges, prosecutors, court reporters, secretaries, etc.

Purely from a monetary standing, petitioner's proposal to provide counsel for persons charged with offenses which may result in a loss of liberty staggers the imagination.

In the same article Note, *Dollars and Sense of an Expended Right to Counsel*, 55 *Ia. L. Rev.* 1249, 1265 (1970) to represent the non-traffic misdemeanor, 1,014 full time public defenders would be needed, and the 12.5 million indigent traffic offenders would require 10,417 public offenders. L. Silverstein, *Manpower Requirements in the Administration of Criminal Justice* in Task Force Report, The Courts (1967) states:

> ". . . there remains a large number of relatively poor States and individual counties that cannot be expected to provide adequate compensation for counsel, or defender systems, no matter how hard they try. These States and counties have such limited financial resources and so many other demands for public expenditures that it is practically impossible for them to provide adequate financial support for defense of indigents either now or in the foreseeable future." *Id.* at 159.

Not only would allowing counsel for misdemeanors cause a severe manpower and financial strain upon the States, but the orderly administration of the Courts would suffer. The Task Force Report: The Courts (1967) states:

> ". . . Undue delay is as inconsistent with the goals of the system as a hasty process in which decisions are made without opportunity for deliberation . . . The courts' inability to handle their volume of cases has many deleterious effects. Most criminal

> cases are disposed of by dismissal or by plea of guilty . . . Defendants often manipulate the system to obtain sentencing concessions in return for guilty pleas . . ." *Id.* at 80.

The report further summarizes that delay may undermine the public's confidence in the system. Despite important advances made in a dozen or more States, the operation of many of the courts in this country remains cumbersome and disjointed. As a specific example, in Passaic and Essex Counties, New Jersey, during March of 1965, the median times in felony cases from accusation to trial were approximately 13 and 12 months respectively. The report states that "these jurisdictions are not singled out as an extreme. Indeed, the fact that delay statistics are available at all indicates a degree of administrative management not available in many courts. *Id.* at 80. The decision to provide counsel for misdemeanants would require further time for trial and would create a severe strain on an already taxed court system.

The State of Utah urges this Court to consider other ramifications of a decision to extend counsel to misdemeanants. By extending counsel to misdemeanants, the case load on public defenders would be so great as to prevent adequate preparation. In view of the phenomenal increase in writs of habeas corpus alleging such complaints as ineffective counsel, involuntary guilty pleas, unintelligent waiver of counsel — counsel for indigent misdemeanants would be a vast new spawning ground for writs of habeas corpus.

Finally, in view of the steadily increasing crime rates, this Court should weigh the beneficial aspects of a requirement of counsel for every possible incarceration against the great need for effective law enforcement. Consideration must be given to the indirect expense of allocating such a massive amount of its legal and judicial resources to this singular area of concern.

III.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS FACING A MAXIMUM PUNISHMENT OF LESS THAN SIX MONTHS.

The language of equal protection clause of the Fourteenth Amendment provides ". . . (n)or shall any State . . . deny to any person within its jurisdiction the equal protection of laws." However, meritorious the claim that "all men are created equal" this Court is not the proper forum to alleviate all social inequality throughout the Nation. Justice Harlan's dissent joined by Justice Steward in *Douglas* v. *California*, 372 U. S. 353 (1963) declared in part:

> The Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances. To so construe, it would be foreign to many of our basic concepts of the proper relations between government and society." *Id.* at 362.

No matter how much the State elects to furnish, persons with money can buy more.

Underlying the expansive view of the scope of equal protection is the theory that all defendants must be given an equal opportunity to be represented by counsel; that opportunity, self provided by the financially able, must be government provided for the indigent. According to *Griffin* v. *Illinois*, 351 U. S. 12 (1956) what is forbidden is allowing "the kind of trial a man gets" to depend "on the amount of money he has." *Id.* at 19. As stated in Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685 713 (1968) "that result is mandatory only if it can be shown that the financially able hire counsel in all such cases; for if they do not, financial ability is clearly irrelevant to the trial of such cases." In the vast majority of "misdemeanors" which also may entail a possible jail sentence, people who can afford attorneys do not do so.

Indeed, if counsel were extended to an indigent charged with a misdemeanor, it would be a denial of equal protection of laws to a non-indigent. The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means. Indigents who are provided with trial counsel, investigative services, trial expenses, and services for expert witnesses, are already receiving more than many non-indigents can afford. To extend counsel to indigents charged with a misdemeanor would be providing another substantial service, which those of modest means could not begin to afford.

Both *Griffin and Douglas*, supra, were cases challenging appellate procedures. While the financially able may be able to insist upon full prosecution of a frivolous appeal, in *Anders* v. *California*, 386 U. S. 738, 744 (1967) this Court held that the indigent is entitled only to counsels' "conscientious examination" of his case and to a brief referring to anything in the record that might arguably support the appeal. If equality on appeal need be attained only "as nearly as practicable," *Id.* at 745, equality at trial surely requires no more.

Equal protection of the law cannot be advanced by promising more than it can deliver. As previously stated, it is impossible to ignore the financial and manpower demands on the legal system that an "absolute" interpretation of the equal protection clause would impose. Furthermore, with crimes punishable by a maximum term of six months, the disparity referable to the absence of counsel is insubstantial.

CONCLUSION

The judgment of the Supreme Court of the State of Florida should be affirmed.

Respectfully submitted,

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